

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN AARON MCKANDERS,

Defendant-Appellant.

UNPUBLISHED

December 18, 2008

No. 274581

Oakland Circuit Court

LC No. 2005-202328-FC

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(e), second-degree criminal sexual conduct, MCL 750.520c(1)(e), four counts of armed robbery, MCL 750.529, and six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.12, to 40 to 60 years' imprisonment for the first-degree criminal sexual conduct conviction, 10 to 30 years' imprisonment for the second-degree criminal sexual conduct conviction, 40 to 60 years' imprisonment for each of the armed robbery convictions and two years' imprisonment for each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

I. Facts

On March 22, 2005, Rashonda Watson and Denise Smith were working at the Lover's Lane retail store in Lathrup Village. Sometime around 7:00 p.m., Watson left the store briefly. When she returned, she saw a man whom she later identified as defendant pointing a revolver at Smith. When defendant saw Watson enter the store, he immediately told her to stop where she was, put down her drink and lock the door. She complied. Defendant then ordered Smith to open the cash register and give him the money it contained. She complied. Watson proceeded to give defendant a cash box that was kept in a file cabinet in the store. Additionally, defendant asked each woman for her personal money, jewelry and cell phone. Then he took possession of the store's security camera videotape.

Defendant then took the women to the store's stock room where he forced Watson to handcuff Smith's hands to a sink and then handcuff her own hands behind her back. He told Watson that he knew that women often kept money in their bras and he began to fondle her breasts. While pressing his gun underneath her chin, defendant pulled her pants down, leaving

her underwear on. He ordered her to bend over a chair and he pressed his body against her. He then left the store and the women called the police.

Four days later, Maya Perkins and Kimberly Schilk were working at the same Lover's Lane store. While just the two of them were in the store, a man walked in and produced a gun. At trial, Perkins testified that defendant was the man with the gun. Defendant pointed his weapon at Perkins and Schilk and demanded money from the cash register. He then ordered the women back to the safe and he emptied the safe of the money it contained. He asked for each woman's cell phone and personal money. Defendant took Perkins to the bathroom and handcuffed her to the sink. He then ordered Schilk to bring him the security camera's videotape. Defendant took Schilk to a back room of the store and began to feel her breasts. He forced her onto her knees and then ordered her to perform fellatio on him, which she did. Defendant then left the store and the women called the police.

Based on the witnesses' descriptions, police produced a composite photo that was aired on local television. An anonymous tipster provided the police with defendant's name. The witnesses participated in separate photo lineups where Smith, Watson and Perkins each identified defendant as the perpetrator. Defendant was arrested and his residence searched. Police recovered a pistol and at trial, Watson and Perkins each testified that the gun was the same as the one used in the crimes. After questioning by police, defendant eventually admitted that he was responsible for the armed robberies and provided details about the robberies and sexual assaults that would only be known to the perpetrator.

II. Identification Evidence

Defendant first contends that the trial court erred in permitting the jury to consider the first-degree criminal sexual conduct victim's in-trial identification of defendant. We disagree. In reviewing a trial court's admission of identification evidence, this Court will not reverse unless the decision was clearly erroneous. *People v Kurylczuk*, 443 Mich 289; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Defendant argues that the trial court erred in permitting the victim to identify defendant at trial when she previously failed to identify defendant in a photo lineup and at the preliminary examination. Additionally, the victim admitted that she had viewed defendant's photograph on the internet several times prior to trial. Defendant incorrectly asserts that she should not have been permitted to identify defendant at trial because there was not a sufficient independent basis for the identification. Defendant improperly applies the analysis that this Court uses when a witness initially identifies a defendant prior to trial as the result of an unduly suggestive procedure and then proceeds to identify him at trial. See *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977). Here, the victim's identification of defendant at trial was her first such identification. As this Court has said, where a witness fails to identify a defendant prior to trial and then proceeds to identify him at trial, the evidence is admissible and the credibility of the identification testimony is a subject to be considered by the jury. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). Therefore, the court did not err when it permitted the jury to consider the victim's testimony.

III. Prosecutorial Misconduct

Defendant next contends that he was denied a fair trial as the result of various acts of prosecutorial misconduct. We disagree. When not properly preserved, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first asserts that the prosecution denied him a fair trial by vouching for the credibility of the witnesses during its closing argument. Specifically, during its rebuttal, the prosecution stated, “Because what purpose does it serve [the victims] to implicate the wrong person?” The prosecution answered its rhetorical question by stating that such a proposition was “ridiculous” and “nonsense.”

In general, a prosecutor is granted great latitude in his closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). “Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of [her] witnesses to the effect that [s]he has some special knowledge concerning a witness' truthfulness.” *Id.* at 476. “But a prosecutor may comment on [her] own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Furthermore, she “is free to argue the evidence and all reasonable inferences from the evidence as it relates to [her] theory of the case.” *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

During closing arguments, defense counsel asserted that the result of the photo lineup was due to the human tendency to think “lets [sic] get the person who did this.” By presenting such an argument, the defense placed the witnesses' credibility in doubt. The prosecutor's comment did not imply that she possessed some special knowledge that allowed her to know that the witnesses were credible. Rather, she simply said that it would not make sense for the witnesses to lie. That argument was proper rebuttal to the defense's criticism of the witnesses' testimony. As such, no misconduct occurred. Furthermore, the trial court instructed the jury that the comments of the attorneys were not to be considered as evidence. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not shown any reason to believe that the jury disregarded the trial court's instruction.

Next, defendant asserts in his standard 4 brief that the prosecution denied him a fair trial for “refusing” to call Officer Armstrong, who, according to defendant, “would have contradicted Officer in Charge, Detective Michael Krause, concerning which officer conducted in-field photo I.D. of defendant.” There is no evidence that Officer Armstrong was listed on the witness list or that the defense wished to call him and that the prosecution failed to produce him. Furthermore, and most importantly, defendant does not explain how the identity of the officer who administered the photo lineup is at all relevant to his conviction.

Next, defendant contends the prosecution denied him a fair trial by introducing evidence of the pretrial identification during the photo lineup. Defendant contends that the lineup was

overly suggestive and unconstitutional and that the prosecution should not have used it during trial. While defendant's argument regarding this topic is disjointed and unclear, it appears that he is alleging that the prosecution knew that the defendant was falsely identified and that it improperly presented the identification evidence.

This Court has explained that the prosecution may not knowingly utilize false evidence and must notify both the defendant and the court if it is aware that one of its witnesses lied under oath. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). In the present case, there is no evidence to suggest that the prosecution knowingly introduced false evidence. Before trial, the court conducted a *Wade*¹ hearing at which it heard testimony and argument regarding the lineup procedure. At the hearing, Detective Krause testified that nobody tried to influence the identification procedure or suggest to the witnesses that they should identify defendant. The trial court admitted the evidence after determining the lineup was conducted properly. There is no indication that the lineup was suggestive. As a result, defendant cannot establish that the prosecution denied him a fair trial where the prosecutor simply introduced evidence that was already properly determined to be admissible.

Next, defendant alleges that a variety of the prosecutor's acts, when taken in the aggregate, denied defendant a fair trial. After making many general allegations of misconduct, defendant does not provide factual support for several of his claims. Specifically, defendant does not provide any example of the prosecutor denigrating him, giving the impression that she had special knowledge in addition to the presented evidence, giving her personal opinion on the evidence or defendant's guilt, vouching for the credibility of a witness or calling upon the jury to do their civic duty. This Court finds that no such occurrences are evidenced in the record and defendant cannot therefore establish that he was denied a fair trial.

Defendant next claims that the prosecution argued facts that were not in the record and that the prosecution improperly argued about sexual assault. However, the record belies his claim. Defendant argues "[t]he prosecutor cannot argue facts or inferences which are not supported by the record. The prosecutor argued that one of the victims was sexually assaulted; that the sex was not consensual, and that she did not have it voluntarily." At trial, the victim explicitly testified that defendant forced her to perform fellatio on him and another victim testified that while she did not see the act occur, she could hear it. Nothing indicates that the victim voluntarily engaged in the sexual activity. Defendant's claim is without merit and fails.

IV. Jury Instructions

Next, defendant alleges that the trial court erred in its instruction to the jury regarding the reasonable doubt standard. After instructing the jury prior to its deliberation, the trial court asked whether the attorneys were satisfied that the instructions were accurate. Defense counsel replied, "yes, your Honor." By affirmatively approving of the court's instructions, defendant waived any objection to the instructions and any error was consequently extinguished. *People v*

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Carter, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, we will not consider this issue on appeal.

V. Ineffective Assistance of Counsel

Next, defendant contends that he was denied the effective assistance of counsel. We disagree. Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court's factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.* Because defendant failed to preserve this issue, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to prevail on an appeal based on ineffective assistance, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

Defendant argues very generally that he was denied the effective assistance of counsel, but does not provide any factual support to his claims. Defendant's standard 4 brief is difficult to read due to spelling and grammatical errors, but he first claims "counsel did not file timely motions premised on witnessed that may have been useful to defense in defendant's case, given counsel lack of preparation for trial after being reassigned to defendant's case coming off of sick leave." Defendant provides no support for this argument. He does not state which motions defense counsel should have brought, which witnesses could have provided support for the motions or how the motions would have affected the outcome of the trial. As stated above, this Court's review of this issue is limited to the record. There is no indication in the record that defense counsel refrained from bringing any motion for which there was support and which could have altered the ultimate outcome of the case.

Next, defendant alleges that defense counsel did not "conduct an interview of any witness for defense, nor investigated the whereabouts of witnesses." Again, defendant does not state which witnesses counsel should have spoken to or explain how those witnesses could have created a reasonable doubt in the face of the prosecution's overwhelming amount of evidence. Defendant cannot establish that defense counsel was ineffective for failing to interview or locate witnesses.

Next, defendant asserts "counsel did not renew his motion for hearings after the end of the State's case, knowing that 'Officer in Charge Detective Krause' perjured himself, by giving false testimony as to who conducted in-field line-up, bringing about the prosecution refusing to call back to the stand, Officer Armstrong to refute testimony." Defendant does not state what "hearings" defense counsel should have sought. Furthermore, as described above, defendant

makes no attempt to explain how the identity of the officer that conducted the lineup was relevant to his conviction. Because defendant cannot establish that the identity of the officer that conducted the lineup was relevant to the jury's findings, he cannot establish that counsel was ineffective for failing to seek a remedy for Detective Krause's allegedly inaccurate testimony.

Defendant next contends that counsel was ineffective for failing to object to various acts of prosecutorial misconduct, for failing to move for a mistrial after the misconduct occurred and for failing to seek a curative instruction for the misconduct. As stated above, the prosecutor did not deny defendant a fair trial and she did not behave improperly. It cannot be said that defense counsel was ineffective for failing to object to the prosecutor's actions, as defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Similarly, because defendant cannot establish that the prosecutor acted improperly, he cannot establish that prosecutorial misconduct served as a legitimate basis for a motion for a mistrial or that he was entitled to a curative instruction. Counsel was not constitutionally deficient for failing to pursue the fruitless paths proposed by defendant.

VI. Additional *Walker* and *Wade* Hearings

Finally, defendant asserts that the trial court erred in denying his attorney's request for additional *Walker*² and *Wade* hearings. Defendant provides no legal support for the notion that he was entitled to additional hearings, nor does he explain what facts the additional hearings would have revealed. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). By failing to adequately brief this issue on appeal, defendant has abandoned it and this Court will not consider it.

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

² *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).